

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SHARON L. BAKER, } Case No. EDCV 09-1885 JC
Plaintiff, }
v. }
MICHAEL J. ASTRUE, } MEMORANDUM OPINION AND
Commissioner of Social } ORDER OF REMAND
Security, }
Defendant. }

J. SUMMARY

On October 8, 2009, plaintiff Sharon L. Baker (“plaintiff”) filed a Complaint seeking review of the Commissioner of Social Security’s denial of plaintiff’s application for benefits. The parties have consented to proceed before a United States Magistrate Judge.

This matter is before the Court on the parties' cross motions for summary judgment, respectively ("Plaintiff's Motion") and ("Defendant's Motion"). The Court has taken both motions under submission without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15; October 15, 2009 Case Management Order ¶ 5.

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1 Based on the record as a whole and the applicable law, the decision of the
 2 Commissioner is REVERSED AND REMANDED for further proceedings
 3 consistent with this Memorandum and Opinion and Order of Remand.

4 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE
 5 DECISION**

6 On June 18, 2003, plaintiff filed an application for Supplemental Security
 7 Income benefits. (Administrative Record (“AR”) 55-56). Plaintiff asserted that
 8 she became disabled on December 29, 2001, due to asthma and herniated disks in
 9 her neck and lower back. (AR 60). After holding a hearing, an Administrative
 10 Law Judge (the “Prior ALJ”) issued an unfavorable decision on July 16, 2005.
 11 (AR 10-16). Following remand orders from this Court and the Appeals Council
 12 (AR 448-49, 450-75), a different Administrative Law Judge (the “ALJ”) heard
 13 testimony from plaintiff, who was represented by counsel, on August 4, 2008, and
 14 February 4, 2009.¹ (AR 336-67, 368-95).

15 On June 9, 2009, the ALJ determined that plaintiff was not disabled through
 16 the date of the decision (“Post-Remand Decision”). (AR 320-31). Specifically,
 17 the ALJ found: (1) plaintiff suffered from the following severe impairments:
 18 disorders of the cervical spine, lumbar spine, and right hand; degenerative disc
 19 disease of the knees, bilaterally; asthma; and headaches (AR 322); (2) plaintiff’s
 20 impairments, considered singly or in combination, did not meet or medically equal
 21 one of the listed impairments (AR 323); (3) plaintiff retained the residual
 22 functional capacity to perform a limited range of light work (AR 323)²; and

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 24 ¹Plaintiff filed a subsequent application for Supplemental Security Income benefits on
 25 December 27, 2005. (AR 497-502). Pursuant to the order of the Appeals Council (AR 448), the
 26 ALJ associated the applications and issued a decision on all of plaintiff’s claims. (AR 320).

27 ²The ALJ determined that plaintiff “can lift and carry 20 pounds occasionally and 10
 28 pounds frequently. She can stand and walk for 6 hours out of an 8-hour work day, and she can sit
 for 6 hours out of an 8-hour work day. She cannot do repetitive movements with the right upper
 extremity. She can occasionally climb ramps and stairs. She cannot climb ladders, ropes, or
 (continued...)

1 (4) plaintiff could perform her past relevant work (AR 330-31). The Appeals
 2 Council did not review the ALJ's decision, and the Post-Remand Decision became
 3 the final decision of the Commissioner. See 20 C.F.R. § 416.1484(d).

4 **III. APPLICABLE LEGAL STANDARDS**

5 **A. Sequential Evaluation Process**

6 To qualify for disability benefits, a claimant must show that she is unable to
 7 engage in any substantial gainful activity by reason of a medically determinable
 8 physical or mental impairment which can be expected to result in death or which
 9 has lasted or can be expected to last for a continuous period of at least twelve
 10 months. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citing 42 U.S.C.
 11 § 423(d)(1)(A)). The impairment must render the claimant incapable of
 12 performing the work she previously performed and incapable of performing any
 13 other substantial gainful employment that exists in the national economy. Tackett
 14 v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

15 In assessing whether a claimant is disabled, an ALJ is to follow a five-step
 16 sequential evaluation process:

17 (1) Is the claimant presently engaged in substantial gainful activity? If
 18 so, the claimant is not disabled. If not, proceed to step two.
 19 (2) Is the claimant's alleged impairment sufficiently severe to limit
 20 her ability to work? If not, the claimant is not disabled. If so,
 21 proceed to step three.

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24 ²(...continued)

25 scaffolds. She can frequently balance. She can occasionally bend, stoop, crouch, and kneel. She
 26 cannot crawl. She cannot do any twisting movements with the right upper extremity. She can
 27 frequently reach overhead with the left upper extremity, and she can occasionally reach above the
 28 shoulder with the right upper extremity. She can frequently handle and finger with the right
 upper extremity. She should avoid extreme cold, humidity, wetness, and vibration. She cannot
 work at unprotected heights. She cannot work in environments with fumes, odors, dust, gases,
 and chemical[s]. She cannot perform repetitive twisting with the upper torso." (AR 323).

- (3) Does the claimant's impairment, or combination of impairments, meet or equal an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1? If so, the claimant is disabled. If not, proceed to step four.
- (4) Does the claimant possess the residual functional capacity to perform her past relevant work? If so, the claimant is not disabled. If not, proceed to step five.
- (5) Does the claimant's residual functional capacity, when considered with the claimant's age, education, and work experience, allow her to adjust to other work that exists in significant numbers in the national economy? If so, the claimant is not disabled. If not, the claimant is disabled.

Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920). The claimant has the burden of proof at steps one through four, and the Commissioner has the burden of proof at step five. Bustamante v. Massanari, 262 F.3d 949, 953-54 (9th Cir. 2001) (citing Tackett); see also Burch, 400 F.3d at 679 (claimant carries initial burden of proving disability).

B. Standard of Review

Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of benefits only if it is not supported by substantial evidence or if it is based on legal error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir. 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457 (9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

1 To determine whether substantial evidence supports a finding, a court must
 2 “consider the record as a whole, weighing both evidence that supports and
 3 evidence that detracts from the [Commissioner’s] conclusion.”” Aukland v.
 4 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d
 5 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming
 6 or reversing the ALJ’s conclusion, a court may not substitute its judgment for that
 7 of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

8 **IV. DISCUSSION**

9 **A. The ALJ Erred in Assessing the Opinions of State Agency**
 10 **Physicians and this Court Cannot Find Such Error to Be**
 11 **Harmless**

12 Plaintiff argues that the ALJ erred by failing to consider the opinions of two
 13 State agency reviewing physicians. (Plaintiff’s Motion at 5-6). The Court agrees.

14 **1. Pertinent Law**

15 In Social Security cases, courts employ a hierarchy of deference to medical
 16 opinions depending on the nature of the services provided. Courts distinguish
 17 among the opinions of three types of physicians: those who treat the claimant
 18 (“treating physicians”) and two categories of “nontreating physicians,” namely
 19 those who examine but do not treat the claimant (“examining physicians”) and
 20 those who neither examine nor treat the claimant (“nonexamining physicians”).
 21 Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996). A treating physician’s opinion
 22 is entitled to more weight than an examining physician’s opinion, and an
 23 examining physician’s opinion is entitled to more weight than a nonexamining
 24 physician’s opinion. See id.

25 Accordingly, an ALJ is “not bound by any findings made by
 26 [nonexamining] State agency” physicians. 20 C.F.R. § 416.927(f)(2)(i). The
 27 Administration recognizes, however, that these individuals “are highly qualified
 28 physicians . . . who are also experts in Social Security disability evaluation.” Id.

1 “Therefore, [an ALJ] must consider findings of State agency [physicians] as
2 opinion evidence,” and “must explain in the decision the weight given to the
3 opinions of a State agency” physician. Id. § 416.927(f)(2)(i)-(ii); Social Security
4 Ruling (“SSR”) 96-6p³ (An ALJ “may not ignore these opinions and must explain
5 the weight given to the opinions in their decisions.”); Sawyer v. Astrue, 303 Fed.
6 Appx. 453, 455 (9th Cir. 2008) (“An ALJ is required to consider as opinion
7 evidence the findings of state agency medical consultants; the ALJ is also required
8 to explain in his decision the weight given to such opinions.”).⁴ Moreover, in
9 determining a claimant’s residual functional capacity, if the ALJ’s “assessment
10 conflicts with an opinion from a medical source, the adjudicator must explain why
11 the opinion was not adopted.”⁵ SSR 96-8p. An ALJ “may reject the opinion of a
12 nonexamining physician by reference to specific evidence in the medical record.”
13 Sousa v. Callahan, 143 F.3d 1240, 1244 (9th Cir. 1988).

2. Analysis

15 Here, the ALJ did not discuss the findings of two State agency reviewing
16 physicians. Both physicians opined, among other things, that plaintiff could only
17 occasionally perform the activities of reaching, handling, fingering and feeling
18 with her right upper extremity. (AR 190, 264). One of the physicians, Dr. Mauro,
19 wrote that these limitations stemmed from plaintiff's radiculopathy (AR 264), a
20 diagnosis plaintiff has received as recently as November 2008 (AR 855). The

³Social Security rulings are binding on the Administration. Terry v. Sullivan, 903 F.2d 1273, 1275 n.1 (9th Cir. 1990). Such rulings reflect the official interpretation of the Social Security Administration and are entitled to some deference as long as they are consistent with the Social Security Act and regulations. Massachi v. Astrue, 486 F.3d 1149, 1152 n.6 (9th Cir. 2007) (citing SSR 00-4p).

⁴The Court may cite unpublished Ninth Circuit opinions issued on or after January 1, 2007. See U.S. Ct. App. 9th Cir. Rule 36-3(b); Fed. R. App. P. 32.1(a).

⁵“Medical sources” are “acceptable medical sources, or other health care providers who are not acceptable medical sources.” 20 C.F.R. § 416.902. “Acceptable medical source[s] . . . include[] treating sources, nontreating sources, and nonexamining sources.” Id.

1 Prior ALJ noted the assessments of the State agency physicians and determined
 2 that plaintiff “has limitations with feeling, repetitive pushing, pulling . . . and
 3 working overhead” with her right upper extremity. (AR 13, 15). In the Post-
 4 Remand Decision, the ALJ made no mention of the State agency physicians’
 5 opinions and determined that plaintiff “can occasionally reach above the shoulder
 6 with the right upper extremity . . . [and] frequently handle and finger with the right
 7 upper extremity.” (AR 323). In light of the pertinent law discussed above, the
 8 ALJ’s failure to explain why he rejected the physicians’ opinions that plaintiff was
 9 limited to occasional handling and fingering constitutes legal error.

10 The Court cannot conclude that the ALJ’s error was harmless.⁶ At step four
 11 of the sequential evaluation process, the ALJ determined that plaintiff was capable
 12 of performing her past relevant work as an inventory control clerk or a newspaper
 13 delivery person. (AR 331). The Dictionary of Occupational Titles (“DOT”)
 14 provides that both of these occupations require frequent reaching, handling, and
 15 fingering. (DOT §§ 219.387-030, 292.457-010).⁷ In addition, the vocational
 16 expert testified that an individual “limited to occasionally gripping, grasping, and
 17 fingering” with “the right, dominant, upper extremity” would not be able to
 18 perform the occupation of newspaper delivery person. (AR 393). Thus, if the
 19 State agency physicians’ opinions were credited, plaintiff would not be able to
 20 perform the past relevant work identified by the ALJ. On remand, the ALJ must
 21 either accept these opinions or provide legally sufficient reasons for rejecting
 22 them. If necessary, the ALJ shall proceed to step five of the sequential analysis.

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 25 ⁶The harmless error rule applies to the review of administrative decisions regarding
 26 disability. See Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1196
 27 (9th Cir.2004) (applying harmless error standard); see also Stout, 454 F.3d at 1054-56
 (discussing contours of application of harmless error standard in social security cases).

28 ⁷The ALJ’s reference to DOT section 219.367-030 (AR 330) appears to be a
 typographical error.

1 **V. CONCLUSION⁸**

2 For the foregoing reasons, the decision of the Commissioner of Social
3 Security is reversed in part, and this matter is remanded for further administrative
4 action consistent with this Opinion.⁹

5 LET JUDGMENT BE ENTERED ACCORDINGLY.

6 DATED: November 10, 2010

7 /s/

8 Honorable Jacqueline Chooljian
9 UNITED STATES MAGISTRATE JUDGE

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24 ⁸The Court need not, and has not adjudicated plaintiff's other challenges to the ALJ's
25 decision, except insofar as to determine that a reversal and remand for immediate payment of
benefits would not be appropriate.

26 ⁹When a court reverses an administrative determination, "the proper course, except in rare
27 circumstances, is to remand to the agency for additional investigation or explanation."
28 Immigration & Naturalization Service v. Ventura, 537 U.S. 12, 16 (2002) (citations and
quotations omitted). Remand is proper where, as here, additional administrative proceedings
could remedy the defects in the decision. McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir.
1989).